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IN THE

Supreme Court of the United States

OCTOBER TERM 1961

No. 122

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
Appellant.

vs.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
Appellee.

(17 Cases)

(Continued on Inside Cover)

On Appeal From the Supreme Court of the State of California.

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

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BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

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vs.

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(13 Cases)

THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES,

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SUBJECT INDEX

PAGE

I.

Due process—secret evidence 2

A. Appellee's illusory "offers" 2

B. Appellee's attempt to inhibit judicial review 4

II.

Due process—incontrovertible assumptions 6

III.

Revised Statutes, Section 5219 6

Conclusion 10

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Bi-Metallic Investment Co. v. State Board of Equalization, 239 U. S. 441	4
Boyer v. Boyer, 113 U. S. 689	8
Evansville Bank v. Britton, 105 U. S. 322	8
Heiner v. Donnan, 285 U. S. 913	6
Londoner v. Denver, 210 U. S. 373	5
Merchants National Bank v. Richmond, 256 U. S. 635	9
Michigan Central R.R. Company v. Powers, 201 U. S. 245	6
Michigan National Bank v. Michigan, 365 U. S. 467	9
Norwegian Nitrogen Co. v. United States, 288 U. S. 294	5
Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U. S. 292	2
Ohio Valley v. Ben Avon Borough, 253 U. S. 287	5
Pelton v. National Bank, 101 U. S. 143	8
People v. Weaver, 100 U. S. 539	9
San Francisco National Bank v. Dodge, 197 U. S. 70	8
Tradesmens National Bank case, 309 U. S. 560	8, 9
United States v. Reynolds, 345 U. S. 1	3

MISCELLANEOUS

67 Congressional Record, Pt. 6, p. 5762	7
House Report No. 526, 69th Cong., 1st Sess.	7

STATUTES

Revised Statutes, Sec. 5219	6, 7, 8, 9
United States Constitution, Fourteenth Amendment	2

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Appellee moves to dismiss or affirm upon the ground that the questions presented are not substantial. In so doing, Appellee inadvertently emphasizes the merit in Appellants' case.

I.
Due Process—Secret Evidence.

Appellants, in their Jurisdictional Statement, pointed out that the effect of the judgments below was to uphold the California franchise tax statute, as applied to national banks, upon the basis of evidence which neither Appellants nor the courts below were permitted to see. Appellants' position, briefly stated, was that under the Fourteenth Amendment California can have its secrecy or its tax—but not both. *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U. S. 292.

Appellee's approach to this fundamental question may fairly be said to be unresponsive. In an ordinary income tax situation, where one man's tax is nobody else's business, a secrecy provision raises no constitutional difficulties. But here, where the secret information (embodied in a mass of unidentifiable franchise tax returns of non-financial corporations) is utilized to determine the tax liability of a different and unrelated group of taxpayers (the national banks), the state policy of secrecy becomes wholly repugnant to due process guarantees.

A. Appellee's Illusory "Offers".

Appellee seeks to minimize the constitutional problem by emphasizing its various "offers" to disclose information at the trial. The inadequacy of these offers was discussed by Appellants at pages 18-19 of the Jurisdictional Statement. We there pointed out that none of said offers permitted access to the net income or components thereof of identifiable corporations. Without such access the bank taxpayers had no way of verifying or proving whether *any* of the figures utilized in

the rate determinations were or were not properly so utilized, since a given corporation's net income status controlled whether and to what extent, if any, its personal property tax figures should be used in the computations.

By the shuffling process described at pages 13-14 of the Motion to Dismiss, Appellants could indeed have verified that a given group of corporations had reported either net income, net loss or no income or loss. We stress, had *reported*. But the fact in issue was not what they had reported, but *whether what they had reported were the true facts.*[1] And the verity of the facts reported could neither be proven nor disproven so long as access to the only source of verification—the identifiable taxpayer filing the return—was cut off by the secrecy provisions of Section 35.

It is also true that in the last week of the trial Appellee made a belated offer to furnish the personal property tax figures of named corporations utilized in the rate computations. But it is obvious that personal property tax figures were irrelevant without access to the concealed net income status of such corporations. Thus, the offer[2] was refused because it was meaningless, as were all of Appellee's other offers.

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[1]And as pointed out at page 20, Note 24 of the Jurisdictional Statement, not only were the returns suspect from the beginning, but the Commissioner's own recomputations as of December 31, 1951, showed that for every year here involved but one, the net income factor of the Section 4a formula had been understated by many millions of dollars.

[2]Appellee's reference to *United States v. Reynolds*, 345 U.S. 1, in connection with its "offer" is hardly apt. In *Reynolds*, the classified electronic equipment, as to which information was withheld by the government, was not shown to have had any causal connection with the accident complained of. Here, the withheld material constituted the very basis of the rate determinations.

Moreover, and as the record will bear out, the offer in question did nothing to refute our statement, which Appellee has seen fit to characterize as misleading, that the undisputed testimony was that the Commissioner's "determinations" could not have been verified by any of the methods suggested by Appellee. [See testimony of witness Bowles, 22 Rep. Tr. 5914-15; *id.*, 5894-5899.]

It is therefore submitted that Appellee's efforts to evade the consequences, from the due process standpoint, of California's attempt to retain both its secrecy and its tax, are devoid of merit. Appellants were denied the right to examine even *one* identifiable taxpayer's net income and personal property tax data, let alone a representative sample of the full 36,000 returns.

B. Appellee's Attempt to Inhibit Judicial Review.

Unable to demonstrate the adequacy, under the Fourteenth Amendment, of its "offers" of information at the trial, Appellee seeks refuge in a specious distinction between "general" or "legislative facts" as opposed to "individual facts"—between quasi-legislative action as distinguished from quasi-judicial action. These distinctions, with all respect, escape us insofar as they are claimed to negative the right to judicial review of the factual determinations of an administrative taxing agency. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U. S. 441, is of no aid to Appellee in our setting: that case involved only an unwarranted attempt to *enjoin* action by the taxing agency. No one here contends that the Commissioner could have been enjoined from fixing the rate; but this does not mean that his acts are judicially untouchable on review. So also, in *Bi-Metallic* no factual determinations were in-

volved; the State Board simply raised already established valuations under state constitutional powers.

Appellee's hidden thesis is that in any case of quasi-legislative action, there is no right to a judicial review of the facts and evidence upon which the agency acted. This proposition is belied by the Court's decision in *Ohio Valley v. Ben Avon Borough,* 253 U. S. 287,[3] where both the majority and the dissenting opinions agreed on the necessity for some type of judicial scrutiny of the evidence underlying a quasi-legislative determination. It is also opposed to the distinction noted in *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 317-318, between those quasi-legislative bodies which (as there) merely advise and those which (as here) ordain. "Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises." 288 U. S. at p. 318.

The true principle is as laid down in *Londoner v. Denver,* 210 U. S. 373, where the court said:

> "But where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard. . . ." (210 U. S. at pp. 385-386.)

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[3]Referred to at page 17, Note 23 of the Jurisdictional Statement.

II.

Due Process—Incontrovertible Assumptions.

Appellants, in their Jurisdictional Statement, noted a further *constitutional* flaw in the franchise tax statute —that, as applied, it sanctions the imposition of a tax upon assumptions of fact which Appellants were forbidden to controvert. Jurisdictional Statement, pp. 21-22. And this despite undisputed evidence of widespread misclassification by California assessing authorities in levying on non-financial corporations the personal property taxes which were the foundation for the assumptions. *Ibid.*

Appellee completely misconceives the import of this argument. It has nothing to do with Revised Statutes Section 5219, but rather with the elementary right of a taxpayer under the Fourteenth Amendment to challenge demonstrably incorrect assumptions of fact. *E.g., Heiner v. Donnan,* 285 U. S. 913. This issue was in no way involved in *Michigan Central Railroad Company v. Powers,* 201 U. S. 245, which is cited by Appellee as dispositive. The point we make is simply that California cannot predicate its tax upon assumptions of fact which the taxpayer is forbidden to controvert.

III.

R. S. 5219.

Appellants, in their Jurisdictional Statement, stressed a third defect in the California statute, namely, that it unlawfully discriminates against national banks in violation of R. S. 5219 by providing for taxation of their franchises at a rate and burden up to twice that imposed on the franchises of non-financial corporations.

Basically, Appellee's position on this question is that R. S. 5219 permits California to double its tax on the

franchises of these federal instrumentalities in order "to make up for their exemption [under that very statute] from personal property tax." Jurisdictional Statement, p. 26. Appellee thus attributes to Congress a bizarre intention to grant the exemption, on the one hand, only to take it away on the other.

The fundamental vice in Appellee's position, in a word, is that it wholly disregards the intention of Congress to *bar*, not to sanction, the discrimination that California openly practices. This is made clear by the Congressional discussions which led to the 1926 amendment of R. S. 5219.[4] The House Report on that measure—the basis upon which it went to the Senate and thence to Presidential approval—made it abundantly clear that irrespective of what method the states employed in taxing their own corporations, the burden of the tax on the banks was not to be higher than the burden imposed upon other corporations generally *under such excise or franchise tax.* We quote from the report:

> "The language of the pending bill is broad enough to permit a state that imposes corporate excise or franchise taxes which are not based on income to apply the net income method to national banking associations, provided the burden of tax is no higher than that imposed upon other corporations generally *under such excise or franchise tax."*[5] [House Report No. 526, Sixty-ninth Congress, First Session; 67 Cong., Rec., Pt. 6, p. 5762; 16 Rep. Tr. 4196.]

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[4]See Appendix to Jurisdictional Statement, pages 42-45.

[5]Emphasis supplied.

When California applied, under R. S. 5219, the fourth method of taxation to national banks, it elected to tax non-financial corporations by the *very same method*[6] as that applied to banks. The subject and the measure of California's franchise tax are hence identical for both banks and other corporations. Only the rates of tax are different, in palpable discrimination against the banks.

Appellee's reliance on the share tax cases to justify the discrimination is inapt. Experience with share tax comparisons early showed that while arithmetical "rates" might be identical, in lip service to R. S. 5219, valuation methods might be varied substantially, to the detriment of the bank shareholders. *Pelton v. National Bank,* 101 U. S. 143. Owners of other moneyed capital might be given deductions or exemptions that were not available to bank shareholders. *Evansville Bank v. Britton,* 105 U. S. 322; *Boyer v. Boyer,* 113 U. S. 689. Or important elements might be omitted in assessing other moneyed corporations, which were included in assessing national bank shares. *San Francisco National Bank v. Dodge,* 197 U. S. 70.

The ingenuity of the states in attempting to evade R. S. 5219 thus led the Court to the adoption of a policy of broad construction of the word "rate" to pre-

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[6]In the *Tradesmens National Bank* Case, 309 U.S. 560, Oklahoma did not tax non-financial corporations by the same method as that applied to national banks. Hence the need, in that case, for a comparison of relative burdens.

vent open discrimination in the overall assessment. *Cf. People v. Weaver,* 100 U. S. 539, 545. But, where a taxing state selects the *same method* of reaching the *same taxable subject* (as permitted by R. S. 5219) in the case of both national banks and its other taxpayers (of the appropriate class prescribed in R. S. 5219), *rate* and *burden* are synonymous. And in such a situation, unlike that in *Tradesmens National Bank v. Oklahoma Tax Commission,* 309 U. S. 560, there is no need for conducting an examination of "the whole tax structure of the state."[7]

In the instant case, all other elements going to make up the tax—except for the rate—are equal;[8] hence there is neither occasion nor reason to justify open discrimination *in the rate* itself. Where, as here, the subject and method of taxation are the same but the rate is different, *both the fact and the extent of the unfriendly discrimination appear on the face of the statute itself. Cf. Merchants National Bank v. Richmond,* 256 U. S. 635.

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[7]The passing reference in *Tradesmens* to the fact that Oklahoma also imposed an ad valorem tax generally upon moneyed capital—traditionally capital in competition with national banks—does not aid California's position here. Such a tax might properly be considered as negating, in Oklahoma's case, the intent to discriminate against national banks which is apparent on the face of the California statute.

[8]Which was not the case in *Michigan National Bank v. Michigan,* 365 U.S. 467. See Jurisdictional Statement, p. 26, N. 29.

Conclusion.

For the foregoing reasons, and for the reasons set forth in the Jurisdictional Statement, it is submitted that the questions presented by these appeals are substantiated and of public importance; and that probable jurisdiction should be noted.

Respectively submitted,

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